Supreme Court, U.S.
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**IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1994**

JASON ERIC DIXON,

Petitioner

vs.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether In Re: Winship* permits a Trial Court to employ the preponderance of the evidence standard in making relevant conduct sentencing determinations as to crimes or criminal conduct not included within the offense of conviction.

*In Re: Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered on March 17, 1995.

CITATION TO OPINION BELOW

The decision of the Court of Appeals dated March 17, 1995, is unreported, and is found in Appendix A to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on March 17, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

The Indictment in this cause was returned on August 21, 1990, by a grand jury in the Middle District of Florida. In summary, the Indictment charged as follows:

Count I Between June 9, 1987, and August 21, 1990, a conspiracy to distribute and possess with intent to distribute 50 grams or more of cocaine base. All five (5) Defendants, including

Petitioner, were charged.

Count II July 26, 1987, charging two (2) other Defendants with possession with intent to distribute a quantity of cocaine base. Petitioner not charged.

Count III June 13, 1988, charging Petitioner alone with possession of more than 50 grams of

cocaine base.

Count IV Also June 13, 1988, charging Petitioner alone with using or carrying a firearm during a drug trafficking crime as charged in Count III.

Count V June 26, 1990, Petitioner (together with two (2) other Co-Defendants) charged with distribution of

	a quantity of cocaine base.
Count VI	July 2, 1990, another Co-Defendant was charged alone with distribution of cocaine base. Petitioner not charged.
Count VII	July 3, 1990, another Co-Defendant was charged alone with distribution of cocaine base. Petitioner not charged.

Count VIII	July 5, 1990, two (2) other Defendants charged with distribution of cocaine base. Petitioner not charged.
Count IX	July 9, 1990, two (2) other Co-Defendants charged with distribution of cocaine base. Petitioner not charged.
Count X	July 11, 1990, three (3) other Co-Defendants charged with

	distribution of more than five (5) grams of cocaine base. Petitioner not charged.
Count XI	July 27, 1990, another Co-Defendant was charged alone with distribution of five (5) grams or more of cocaine base. Petitioner not charged.

At trial, the Petitioner was convicted only of Count III which charged him with possession of more than 50 grams of cocaine

base (specifically 107.5 grams) on June 13, 1988. He was acquitted of all other substantive Counts. And, the jury was unable to reach a verdict as to Count I (conspiracy) and the Court thereupon declared a mistrial as to that Count. The conspiracy Count has since been dismissed on Motion of the Government. The applicable guidelines for the single charge of which the Petitioner was convicted (possession of 107.5 grams of cocaine base) was from 135-168 months. Notwithstanding the jury findings, at the time of sentencing the Court found that the Petitioner was a member of the conspiracy charged in Count I, was a leader and organizer in that conspiracy, and was liable for "firearm enhancement". Over objection, the Court thereupon sentenced Petitioner to 480 months (40 years) in prison.

On initial appeal the Eleventh Circuit Court of Appeals in an unpublished decision

affirmed Dixon's conviction but remanded for resentencing because of the Trial Court's four (4) level enhancement based upon a finding that the Petitioner was a "leader and organizer" of the conspiracy for which he was not convicted. Although Petitioner objected to the use of the preponderance of the evidence standard to calculate relevant conduct, the Eleventh Circuit affirmed on this issue without discussion.

Resentencing took place on September 22, 1993. The Trial Court[1] again overruled the Petitioner's objections based upon the standard of proof required for "relevant conduct findings". Specifically, Petitioner objected to the employment of the preponderance standard when making findings as

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[1]Petitioner was resentenced before a different District Judge because the trial and original sentencing Judge, The Honorable Susan H. Black, had, in the interim, been elevated to the Eleventh Circuit Court of Appeals

to unconvicted conduct (or, indeed, acquitted conduct). Petitioner urged the Trial Court to employ, at a minimum, the standard of "proof beyond a reasonable doubt" for such findings.

At the time of sentencing, the Trial Court reaffirmed the findings made by its predecessor and explicitly employed the "preponderance of evidence" standard to make a finding that the Petitioner was a member of the conspiracy and therefore accountable for all controlled substances distributed thereby. In like fashion, the Trial Court employed the same standard in imposing the "firearm enhancement".

The Trial Court found a base offense level of 36 and a two (2) level enhancement for possession of a firearm. With a Criminal History Category II, Dixon's guideline imprisonment range was found to be 262-327 months and the District Court sentenced him to

294 months imprisonment. The effect of the Trial Court's factual finding as to unconvicted conduct was to enhance the Defendant's sentence by at least 126 months.

In his second direct appeal, the Petitioner presented the single issue of whether the Trial Court erred in enhancing the Petitioner's guideline range by employing the preponderance of the evidence standard to determine his "guilt" for crimes other than the offense of conviction.

In an unpublished opinion, the Eleventh Circuit Court of Appeals affirmed the Trial Court's use of the preponderance standard and reaffirmed previous Eleventh Circuit authority so holding.

REASONS FOR GRANTING THE PETITION

Petitioner was convicted of a single Count charging the discrete crime of possession with intent to distribute in excess of 50 grams of cocaine base on June 13, 1988. At trial there was no showing of linkage of this event to any other overt acts charged in the Indictment or otherwise presented by the testimony. Indeed, the specific facts of the event did not involve any of the named Co-Conspirators in this Indictment. Rather, it involved a police officer's alleged observation of the Petitioner getting out of a vehicle driven by his cousin, going to another parked vehicle, opening the trunk, and placing within it a package which was later found to contain 107.5 grams of cocaine base.

He was acquitted of all other substantive crimes of which he was accused. And,

importantly, there was no conviction for the conspiracy charged in Count I. This Count was later dismissed on Motion of the Government.

Thus, it cannot be said that the Trial Court merely made sentencing determinations about the characteristics of a specific crime for which Petitioner was convicted. There is no dispute regarding the facts underlying that conviction. Rather, the Court made a finding of his "guilt" as to other, distinct crimes which it found to be related as described in United States Sentencing Guidelines Section 1B1.3.

It may be that due process required no more than a preponderance of the evidence to establish "sentencing factors" about the specific crime of which he had been convicted. However, it is a far different matter, squarely inconsistent with In Re: Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368

(1970) to sentence for separate crimes for which the Defendant has not been convicted or, indeed, for which he has been acquitted.

The facts here provide a clear, uncluttered illustration of the due process issues presented by judicial fact finding as they relate to sentencing for unconvicted conduct. Accordingly, this case presents the Court an opportunity to decide what is and is not constitutionally permissible in finding "relevant conduct" under the United States Sentencing Guidelines Section 1B1.3.

The guidelines require, for the first time, that a sentencing judge enhance a sentence based on findings of criminal conduct at sentencing. They constitute a radical departure from traditional discretionary sentencing practices. The guidelines have replaced unfettered judicial discretion with a fact finding process which structures

judicial decision making. And, as this case illustrates, that fact finding is not limited to the offense of conviction. Rather, like here, the Trial Court is apparently free to make findings that the accused committed other distinct crimes for which he has not been convicted or, indeed, been acquitted. That fact finding then requires the Trial Court to sentence within the range prescribed by that fact finding.

This is radically unlike the traditional discretionary sentencing situation. Formerly, a convicted Defendant had no liberty interest in a sentence below the statutory maximum because the Trial Judge's discretion to sentence the Defendant up to the statutory maximum was "unfettered". Connecticut Board of Pardons v. Dumschat, 452 U.S. 458,465, 101 S.Ct. 2460,2465, 69 L.Ed.2d 158 (1981). Here, the Petitioner was convicted by jury of the

discrete act of possessing 107.5 grams of crack cocaine on a specific occasion in June of 1988. Because of the quantity, he was subject to a ten (10) year minimum mandatory and a maximum sentence of life. If there were no sentencing guidelines formula in place, the Petitioner could constitutionally be said to have no "liberty interest" in a specific sentence anywhere within the permitted range. See e.g. McMillan v. Pennsylvania, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986).

In McMillan, the accused faced a statutory maximum of 20 years imprisonment. Under Pennsylvania's sentencing scheme, the Trial Court had full discretionary authority to impose a sentence up to the statutory maximum. In McMillan, the Supreme Court found no due process deprivation based upon the Trial Court's determination (as a "sentencing factor") that the Defendant had visible

possession of a firearm while committing the offense of conviction. This separate "sentencing factor" finding required the Court to impose a minimum sentence of five (5) years.

Thus, in McMillan, all the accused lost was the hope of a sentence less than five (5) years. This Court determined that the preponderance of evidence standard was constitutionally permissible for finding sentencing factors that "provide sentencing Courts with additional guidance" without altering the statutory maximum for the offense of conviction. Id. at 87-88, 92 106 S.Ct. at 2416-17, 2419.

However, the McMillan analysis does not persuasively apply to separate crimes for which the accused has not been convicted and are not included within, but only related to the offense of conviction. Obviously, the

finding of the Petitioner's "guilt" as to other distinct crimes does not alter the statutory maximum of the offense of conviction. However, just as obviously, Petitioner has far more than an unilateral hope in a sentence less than the maximum. Indeed, absent some basis for departure, the Defendant had an expectation of sentence between 135-168 months. This expectation created a liberty interest protected by due process because the Sentencing Judge no longer had the discretion to impose a higher sentence up to the statutory maximum "for whatever reason or for no reason at all". Meachum v. Fano, 427 U.S. 215, 96 S.Ct. 2532, 49 L.Ed.2d 451 (1976). Under the sentencing guidelines, judicial discretion has all but disappeared. The sentence authorized by statute (here life imprisonment) is no longer the "maximum" sentence. The "maximum" sentence is, in

reality, the upper end of the range established by the sentencing guidelines computation.

Once this simple truth is recognized, In Re: Winship, must control. In Re: Winship the Court's primary holding was that due process protects an accused in a criminal prosecution against conviction except upon proof beyond a reasonable doubt. That historically and constitutionally unremarkable proposition was supported by discussion that compels its application to our facts.

Justice Harlan in particular acknowledged that the phrases "preponderance of the evidence" and "proof beyond reasonable doubt" were quantitatively imprecise. Nonetheless, he found that these terms communicated to the finder of fact far different notions concerning the degree of confidence that he was expected to have in the correctness of his

factual conclusion. The "reasonable doubt" standard found only in criminal cases, was bottomed in our society's fundamental value determination that it was far worse to convict an innocent man than to let a guilty man go free.

Justice Harlan observed that in any factual dispute the fact finder rarely (if ever) can obtain perfect or "unassailable" knowledge of what actually happened. All that can be obtained is the conclusion of what "probably" happened. This necessarily implies the risk of error and erroneous judgement based thereon. Thus, the standard of proof employed directly influences the risk of such error.

In a civil dispute over money, our society views it, in general, to be no more serious for there to be an erroneous verdict in the Defendant's favor than an erroneous

verdict in favor of the Plaintiff. Thus, the requirement that the balance be tipped only slightly only one way or another is "peculiarly appropriate". In Re: Winship, 397 U.S. at 371.

However, because of the value that our society places on a citizen's "liberty interest", the margin of error to be tolerated (i.e. the standard of proof required) is necessarily different. Justice Brennan wrote for the Court in Speiser v. Randall, 357 U.S. 513,525-526, 78 S.Ct. 1332, 2 L.Ed. 2d 1460 (1958):

> [T]here is always in litigation a margin of error, representing error of fact finding which both parties must take into account. Where one party has at stake an interest of transcending value--as a criminal Defendant in his liberty--this margin of error is reduced as to him by the process of placing on the other party the burden...

> of persuading the fact finder at the conclusion of the trial of his guilt beyond a reasonable doubt.

Here, the Trial Court was required to sentence Petitioner to approximately ten (10) years additional incarceration because of its findings (by preponderance of the evidence) that he had committed other crimes, separate and distinct from the offense of conviction. Petitioner would respectfully suggest that this Court should examine this practice in light of In Re: Winship to determine whether it is constitutionally permissible.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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APPENDIX

IN THE UNITED STATES COURT OF APPEAL

FOR THE ELEVENTH CIRCUIT

NO. 93-3213
Non-Argument Calendar

D.C. Docket No. 90-127-CR-J-20

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JASON ERIC DIXON,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(March 17, 1995)

Before KRAVITCH, HATCHETT, and ANDERSON, Circuit Judges.

PER CURIAM:

Appellant was convicted of possession with intent to distribute cocaine. The jury was unable to reach a verdict on the conspiracy charge against him. However, at sentencing the District Court found that the Appellant was a member of the drug conspiracy and, in accordance with the Sentencing Guidelines' "relevant conduct" provision, computed a base offense level based on the quantity of cocaine involved in the conspiracy.

On this (Appellant's second) appeal, Appellant argues that the Due Process Clause required the government to prove his relevant conduct "beyond a reasonable doubt." We have already decided that the Due Process Clause does not require that relevant conduct for sentencing be proven beyond a reasonable doubt. United States v. Alston, 895 F.2d 1362, 1372-73 (11th Cir. 1990). Accord United

States v. Manor, 936 F.2d 1238, 1242-43 (11th Cir. 1991) (a Sentencing Court may consider acquitted acts if they constitute relevant conduct and are established by preponderance of the evidence). Therefore, the District Court is

AFFIRMED.